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FILED/ACCEPTED

SEP 30 2011

Federal Communications Commission
Office of the Secretary

September 30, 2011

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Via Hand Delivery

Re: MB Docket No. 11-139, RM-11636

Dear Ms. Dortch:

Enclosed please find, on behalf of The University of North Carolina, an original and one copy of comments for filing in the above-referenced proceeding.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with this office.

Sincerely,



Stephen Hartzell
Counsel to The University of North Carolina

Enclosures

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Before the
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Washington, D.C. 20554

FILED/ACCEPTED

SEP 30 2011

Federal Communications Commission
Office of the Secretary

In the Matter of)	
)	
Amendment of Section 73.622(i),)	MB Docket No. 11-139
Post-Transition Table of DTV Allotments,)	RM-11636
Television Broadcast Stations)	
(Hampton-Norfolk, Virginia; Norfolk,)	
Virginia-Elizabeth City, North Carolina))	

**THE UNIVERSITY OF NORTH CAROLINA'S
COMMENTS IN OPPOSITION**

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Summary

Hampton Roads has proposed to modify the DTV Table of Allotments to add a new hyphenated assignment community of Norfolk, Virginia-Elizabeth City, North Carolina and to change the community of license of WHRO-TV from Hampton-Norfolk, Virginia, to Norfolk, Virginia-Elizabeth City, North Carolina. It is so plainly contrary to law and fact that it must be denied.

WHRO-TV is the only full-power television station in the United States with a hyphenated community of license, and Hampton-Norfolk is the only hyphenated assignment market in the DTV Table of Allotments, 47 C.F.R. § 73.622(i). Thus, the current hyphenated status of WHRO-TV's community is sui generis, and it derives from the unique and special dispensation given the station at its inception, when the full Commission recognized the importance of hyphenating Norfolk and Hampton to ensure that Hampton would retain a stake in WHRO-TV.

Hampton Roads has presented no evidence whatsoever to establish that the hyphenation of Norfolk-Elizabeth City creates a viable community for allotment purposes. The Petition argues that the proposal furthers the allotment priorities, but that puts the cart before the horse. The allotment priorities cannot be evaluated where the "destination" allotment does not qualify as a community. The Commission has always given hyphenated allotments special scrutiny to ensure that the hyphenation of two locales into one compound community is proper or that other special circumstances exist to justify the hyphenation. Hampton Roads' only evidence regarding the propriety of the proposed hyphenated community relates solely to Elizabeth City, and the evidence establishing Elizabeth City as a community actually contributes to defeat the argument that the two locales would make an appropriate compound hyphenated community.

This is critically important, because relevant Commission precedent makes clear that a hyphenated allotment will be granted only in three narrow circumstances:

First, a channel is assigned to a hyphenated market where it is best to postpone until the application stage any unresolved or close questions as to which community should use the assignment. *Huntsville-Decatur, Alabama*, 44 RR 2d 457 (1978). Second, hyphenation is proper upon a showing that a station licensed to a small community is likely to fail unless it is able to apply for authority to operate from a larger community. *Nogales-Tucson, Arizona*, 32 FCC 2d 885 (1972). Third, hyphenation is appropriate where it appears that the communities should be treated as one community by reason of their proximity and common social, cultural, trade and economic interests. *Lancaster-Lebanon, Pennsylvania*, 24 RR 1564 (1962).¹

Neither the Petition nor the comments of Hampton Roads filed on September 23 even suggest—let alone demonstrate convincingly—that the instant proposal fits any of these three lines of cases. And, in fact, it does not.

The first two lines of cases are clearly inapplicable here. With respect to the third line of cases, there are no facts that demonstrate that Norfolk and Elizabeth City should, together, be treated as one community, i.e., Norfolk, Virginia-Elizabeth City, North Carolina. The two cities are located nearly 45 miles apart, in different states, with no common governance, and no evidence has been offered to demonstrate that the two locales are interdependent in any way. Norfolk is considered to be the heart of the Hampton Roads geographic area—an area that does not include Elizabeth City, North Carolina—while Elizabeth City is the anchor of its completely separate, eponymous Micropolitan Statistical Area. Clearly, Hampton Roads' proposal falls far

¹ *Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations (Hampton-Norfolk-Portsmouth-Newport News, Virginia)*, Report and Order, 53 Rad. Reg. 2d 53, 55 (1983), ¶ 8.

short of making the requisite “very compelling showing”² as to why Norfolk and Elizabeth City should be hyphenated into one compound community.

In addition, the *Hampton-Norfolk-Portsmouth-Newport News, Virginia* case, by rejecting arguments regarding the interdependence of Virginia Beach (which is a city located in the Hampton Roads geographic region close to Norfolk) and various other Hampton Roads area cities, is directly applicable precedent that provides strong rationale for why the proposal now under consideration cannot possibly meet the necessary standard. Moreover, the instant case is readily and critically distinguishable from other cases, all of which are discussed below, in which the Commission has granted hyphenated community proposals.

Furthermore, Hampton Roads’ service was historically, continues to be today, and will always be primarily directed to the residents of Hampton-Norfolk. Hampton Roads has provided no evidence of programming that currently or will in the future address the specific needs and interests of Elizabeth City. Hampton Roads is owned by 18 Virginia school districts, and the organizational documents of the licensee limit ownership of the licensee to school districts in Virginia. In light of that organizational limitation, it strains credulity to imagine that WHRO-TV’s primary mission and service will become Elizabeth City, North Carolina. In fact, the Petition makes clear that WHRO-TV will continue its current level and nature of service to both Hampton and Norfolk, a circumstance which makes it difficult to understand how Hampton Roads will be able to make the needs and interests of Elizabeth City its primary service mission as is required.

² *Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Bryan and College Station, Texas)*, Report and Order, 3 FCC Rcd 263 (1988), ¶ 2.

Fatally, Hampton Roads has not requested a waiver of any of the well-established policies that are in play: the Commission's no-hyphenation policy in the DTV Table of Allotments and case law; the Commission's no-hyphenation policy with respect to communities of license; the Commission's prohibition on removing a community's sole transmission service (in this case, the community of Hampton-Norfolk). In any event, no public interest arguments have been asserted to justify a waiver of any of the relevant policies. The allotment priorities cannot be used as a public interest justification because they are not even triggered by the Petition since the proposed Norfolk, Virginia-Elizabeth City, North Carolina compound community has not been (and cannot be) shown to be a community for allotment or licensing purposes.

Finally, since the Commission's NPRM proposed to make only Elizabeth City, North Carolina—and not the hyphenated Norfolk-Elizabeth City—the community of license for WHRO-TV, it is unclear whether Hampton Roads is interested in pursuing that proposal; after all, Hampton Roads' comments filed on September 23 do not indicate any acknowledgement or recognition that the NPRM modified the community of license proposal sought in the Petition.

* * *

In the Matter of

MB Docket No. 11-139
RM-11636

The University of North Carolina (“UNC-TV”),¹ by its attorneys, provides these comments in opposition to the proposal of Hampton Roads Educational Telecommunications Association, Inc. (“Hampton Roads”), licensee of WHRO-TV, Hampton-Norfolk, Virginia, which is the subject of the *Notice of Proposed Rulemaking* in the above-referenced docket, DA 11-1401 (released August 17, 2011) (“*NPRM*”).² In the *NPRM*, the Video Division requests comment on a proposal by Hampton Roads to (i) amend the post-transition DTV Table of Allotments, 47 C.F.R. § 73.622(i), to reallocate Channel *16, Hampton-Norfolk, Virginia, currently

² The NPRM was published in the Federal Register on August 31, 2011. *See Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations (Hampton-Norfolk, Virginia; Norfolk, Virginia-Elizabeth City, North Carolina)*, Notice of Proposed Rulemaking, 76 Fed. Reg. 54189 (Aug. 31, 2011). Hampton Roads filed comments in this proceeding on September 23, 2011. Hampton Roads' comments provide no additional information to justify a grant of the Petition; the comments are nearly the Petition verbatim.

used by Hampton Roads's noncommercial educational station WHRO-TV, to Norfolk, Virginia-Elizabeth City, North Carolina, and (ii) similarly change WHRO-TV's community of license.

As demonstrated below, Hampton Roads' proposal does not further the Commission's allotment priorities because it (i) would undermine the original basis of Hampton's hyphenated authorization in the place, which was to ensure that Hampton, whose schools are owners of the licensee and whose interests are represented by WHRO-TV, retained a "stake" in the authorization; (ii) would join together two distinct communities, in different states, that do not, by any measure, constitute "one community by reason of their proximity and common social, cultural, trade and economic interests"; and (iii) would do nothing to provide service to Elizabeth City, North Carolina, given WHRO-TV's core mission, as expressed in its founding documents, to provide service targeted to the needs and interests of Hampton, Norfolk, and the surrounding Hampton Roads geographic area.

I. Introduction and Background

WHRO-TV's current community of license is Hampton-Norfolk, Virginia, and its channel is assigned to the Hampton Norfolk allotment market. Hampton Roads has proposed to re-hyphenate WHRO-TV's market for allotment purposes and modify the DTV Table of Allotments such that Channel *16 would no longer be allotted to Hampton-Norfolk but would instead be allotted to Norfolk, Virginia-Elizabeth City, North Carolina. Hampton Roads also proposes to change WHRO-TV's community of license from the currently hyphenated Hampton-Norfolk, Virginia community to Norfolk, Virginia-Elizabeth City, North Carolina.

WHRO-TV has a half-century history of serving the community of Hampton-Norfolk, Virginia. By full Commission action, Hampton Roads was granted the original construction permit for WHRO-TV on July 17, 1961, as announced by Public Notice dated July 18, 1961

(copy attached as Exhibit 1). The grant was supported by a Commission Staff report ("WHRO-TV CP Report"), which was circulated to and approved by the full Commission en banc and made part of WHRO-TV's permanent public record. (A copy of the WHRO-TV CP Report is also attached as part of Exhibit 1.) The WHRO-TV CP Report directly addresses the hyphenated community of license (Hampton-Norfolk) as follows:

The applicant requests a waiver of Section 3.607(b) of the Commission's rules in order to permit the proposed station to be licensed to "Hampton-Norfolk". In support of the request, it is urged that the applicant is, in effect, a joint venture of Norfolk and Hampton which will be supported by both cities and is designed to provide educational programming for the school population in both cities; that the station will not have a main studio for its first year of operation, but will utilize the studios of the existing commercial stations in that area; that Channel 15 is assigned to Norfolk-Portsmouth-Newport News on a hyphenated basis; that Hampton is located within 15 miles of Norfolk; and that these circumstances present a unique situation which warrants grant of the requested waiver.³

The WHRO-TV CP Report opines on the proposed hyphenated community of license (and the corresponding waiver of Section 3.607) as follows:

The Commission's past policy has been to deny requests for dual licensing and, instead, where indicated, grant requests for waiver of Section 3.652(a) of the Rules to permit only dual identification on the air. The applicant's arguments in support of its waiver request appear to be weak. Nonetheless, since the present application proposes a non-commercial station, there are no compelling reasons to deny the requested waiver since it will not have an economic impact on commercial competitors. Accordingly, to forestall the possibility that a failure to grant the requested waiver might have an adverse effect on the City of Hampton's participation in the applicant, the Broadcast Bureau believes a grant of the waiver request would be warranted.

* * *

³ WHRO-TV CP Report, ¶ 6(b).

In view of the foregoing, it is recommended that the requested waiver of Section 3.607(b) of the Rules be granted, to allow the proposed station to be licensed to “Hampton-Norfolk”

⁴
....

To date, WHRO-TV remains the *only* full power television station in the country with a hyphenated community of license. Now, however, Hampton Roads proposes to remove the hyphen from “Hampton-Norfolk”—a hyphen that, effectively, represents the bridge that connects those two closely associated, interdependent communities—excise “Hampton” altogether, and add, instead, a distant city in another state to a new hyphenation of Norfolk, Virginia-Elizabeth City, North Carolina. As noted above, the only reason “Hampton” is part of this uniquely hyphenated community of license in the first place was to ensure Hampton’s stake in the venture; Hampton Roads’ proposal runs contrary to the representations previously made to the Commission, and it flouts the Commission’s clearly articulated concerns about the original hyphenation grant. In light of the licensee’s organizational structure, as discussed below, to this day it remains important to the success of WHRO-TV that all of Hampton Roads’ constituent owner-institutions continue to have and value a stake in the venture.

In its Petition, Hampton Roads argues that grant of the proposals would better serve the Commission’s allotment priorities and policies, but Hampton Roads offers precious little justification for the changes and cites no relevant precedent whatsoever for its proposal. In fact, the proposal contravenes everything from the Commission’s original grant of the Station’s initial construction permit to the DTV Table of Allotments to a long line of Commission cases.⁵ As such, the Petition must be denied.

⁴ WHRO-TV CP Report, ¶¶ 7(b), 8.

⁵ The proposal also violates the prohibition on removing a community’s sole transmission service. While the Petition expressly recognizes that a change in community of license “must not deprive a
(continued ...)

II. Hampton Roads' Proposals to Modify WHRO-TV's Market for Allotment Purposes and Community of License Are Contrary to Commission Policies and Precedent

Hampton Roads' Petition attempts to characterize its proposal as a simple and straightforward allotment priorities case as follows: Elizabeth City is a community for allotment purposes; Elizabeth City has no television station; allotting WHRO-TV's channel to Norfolk, Virginia-Elizabeth City, North Carolina, would give Elizabeth City its first television station; therefore, the proposal results in a more fair, efficient, and equitable distribution of service.

As a matter of law, however, neither the reallocation proposal nor the community of license change is simple or straightforward because each involves hyphenation of two distinct and separate communities. Because the hyphenation of two locales into one allotment market

community of its sole existing broadcast station," Petition, at 2, it goes on to erroneously conclude that the proposal "does not deprive any community of a television station, because Hampton Roads [i.e., the geographical region] will continue to receive service from its existing location [sic] station, WVEC-TV [sic]. Hampton will no longer have two television stations (Priority 4), but Elizabeth City will have a first television station as required by Priority 2, which ranks higher than Priority 4." Petition, at 4. The Petition is wrong on this point. Hampton does not have two television stations—only one station, WVEC, is allotted and licensed to Hampton, and the second station to which the Petition refers, WHRO-TV, is allotted and licensed to the community of Hampton-Norfolk. Thus, Hampton Roads has proposed to remove the sole transmission service licensed to the hyphenated community of Hampton-Norfolk, which was specially approved by the full Commission just for WHRO-TV at the station's request. Hampton Roads has offered no public interest benefits to justify the removal of Hampton-Norfolk's sole transmission service and has not requested a waiver of the Commission's well-established policy prohibiting the removal of a sole transmission service. Thus, even if the Commission were somehow to determine that the proposed hyphenated allotment is a viable allotment community and, then, to reach an analysis of the allotment priorities, Hampton Roads' request must be denied on this basis. Thus, this case is significantly different from *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations*; and *Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Columbia and Edenton, North Carolina)*, Report and Order, 20 FCC Rcd 12457 (2005), where the Commission found UNC-TV's proposal to remove a sole transmission service to be in the public interest under the "special facts of th[e] case." *Id.* ¶ 13. There, UNC-TV requested and was granted a waiver of the policy because "a publicly funded state-wide educational network [wa]s attempting to find the most efficient manner in which to deliver its educational programming to all of its viewers." *Id.* ¶ 10. Hampton Roads' proposal does not fall within the ambit of that case, however, because WHRO-TV is not part of a state-wide educational network, and it is not "seek[ing] to overcome geographic and service anomalies to greater facilitate its state-wide noncommercial educational program service to . . . residents [of its home state]." *Id.* ¶ 12. Moreover, without requesting and receiving a waiver of the policy, Hampton Roads cannot take advantage of the Section 1.420(i) procedure without risking competing proposals.

runs the risk of improperly combining two separate communities, the Commission has repeatedly given hyphenation proposals special scrutiny. The wealth of controlling Commission precedent, discussed below, makes clear that, when considering hyphenated allotments, the Commission wishes to ensure either that the two locales being hyphenated are, in fact, one compound community or that other special and unique circumstances exist to justify the hyphenation. Here, Norfolk, Virginia, and Elizabeth City, North Carolina, are not, for allotment purposes (nor for any other purposes) one community,⁶ and no special circumstances exist or have been articulated by Hampton Roads. As a result, the allotment priorities are not triggered, and Hampton Roads' proposals are unwarranted and ungrantable.⁷

In other words, Hampton Roads' discussion of the allotment priorities puts the cart before the horse: An analysis of the allotment priorities—and whether the proposal qualifies for Section 1.420(i) treatment—is improper without first determining whether the destination hyphenated allotment market is a viable community under the Commission's considerable precedent. As demonstrated below, the proposed hyphenation of Norfolk, Virginia-Elizabeth City, North Carolina, is not viable as an allotment community. As such, no consideration of the allotment priorities is warranted, and the Petition must be denied.

⁶ To be clear, UNC-TV is not arguing whether Norfolk, by itself, or Elizabeth City, by itself, is a community. The critical question in this proceeding is whether the compound, hyphenated nomenclature of "Norfolk, Virginia-Elizabeth City, North Carolina" is a community. It is not.

⁷ Hampton Roads' argument that its proposal serves the second allotment priority—"Provide *each community* with at least one television broadcast station"—must fail because the combined locales of Norfolk, Virginia, and Elizabeth City, North Carolina, do not, together, constitute one community.

A. The Commission Eliminated Hyphenated Markets in the DTV Table of Allotments, and Hampton Roads Has Failed to Request a Waiver of the Commission's Clear No-Hyphenation Policy

To understand the impropriety of Hampton Roads' proposal to re-hyphenate its market, one need look no further than the DTV Table of Allotments, which contains only one hyphenated market, and it belongs to WHRO-TV.⁸ This represents a significant change from the analog Table of Allotments, which contained ten hyphenated markets.⁹ The clear import of the Commission's policy decision to eliminate hyphenated markets from the DTV Table of Allotments is evidenced by the nature of the summary pronouncement in the *Seventh Report and Order*:

The Commission did not use hyphenated markets in the initial DTV Table and did not use hyphenated markets in the new DTV Table proposed in the *Seventh Further Notice*.¹⁰

That the Commission dealt with the allotment hyphenation issue so summarily illustrates the rigid nature of the Commission's policy not to hyphenate allotment markets.

⁸ See 47 C.F.R. § 73.622(i).

⁹ See 47 C.F.R. § 73.606(b). The ten markets hyphenated in the analog Table of Allotments were Huntsville-Decatur, Alabama; Tucson-Nogales, Arizona; Salinas-Monterey, California; Vallejo-Fairfield, California; Minneapolis-St. Paul, Minnesota; Hay Springs-Scottsbluff, Nebraska; Linden-Newark, New Jersey; Albany-Schenectady, New York; Monahans-Odessa, Texas; and Norfolk-Portsmouth-Newport News-Hampton, Virginia. Three additional markets in the analog Table of Allotments contained hyphens: Kailua-Kona (Hawaii), Hawaii; Winston-Salem, North Carolina; and Wilkes-Barre, Pennsylvania. See 47 C.F.R. § 73.606(b). In each of those three cases, however, the hyphens are not used to designate compound markets for allotment purposes, but, instead, the hyphens are part of city names (Winston-Salem and Wilkes-Barre) and, in the case of Kailua-Kona, the hyphen is used as is traditional to distinguish the locale of Kailua in Hawai'i County from the locale of Kailua in Honolulu County. See, e.g., Kailua, Hawaii County, Hawaii, available at <http://en.wikipedia.org/wiki/Kailua,_Hawaii_County,_Hawaii>.

¹⁰ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Seventh Report and Order and Eighth Further Notice of Proposed Rule Making, 22 FCC Rcd 15581 (2007), ¶ 101 (footnotes omitted).

Moreover, while hyphens no longer appear in the DTV Table of Allotments, the Commission continues to recognize one compound allotment in the Table of Allotments: “Hampton Norfolk,” which is the allotment market for WHRO-TV.¹¹ Thus, the request of Hampton Roads to *re-hyphenate* its market as Norfolk, Virginia-Elizabeth City, North Carolina fails both (1) to recognize the overarching policy decision made by the full Commission to abandon hyphenated markets for allotment purposes in the DTV era and (2) to understand the apparently special nature of the Hampton-Norfolk designation as the only allotment market that has, in the Commission’s eyes, continued to warrant its special compound status. Indeed, the special nature of the Hampton-Norfolk compound allotment, preserved just for WHRO-TV, derives from WHRO-TV’s hyphenated community of license, which is discussed above.

Given the Commission’s unmistakable policy to no longer use hyphenated markets in the DTV Table of Allotments, Hampton Roads should have requested—but did not—a waiver of the policy. As such, the Petition must fail without further consideration of its merits.

B. Well-Established Case Law Makes Clear That Hampton Roads’ Proposals Must Be Denied

As Commission cases have stated repeatedly, the standard for hyphenating a market for allotment purposes is extremely high—indeed, the Commission has established that “Petitioners who seek hyphenated allotments must make a *very compelling showing*.”¹² The high standard is

¹¹ See 47 C.F.R. § 73.622(i). Interestingly, the DTV Table of Allotments deleted *all* hyphens, including the hyphens that are part of a city’s name, as in the cases of Winston-Salem, North Carolina, and Wilkes-Barre, Pennsylvania, and the hyphen in Kailua-Kona, which, as discussed above in footnote 9, is traditionally used to distinguish the locale of Kailua in Hawai’i County from the locale of Kailua in Honolulu County. The deletion of the hyphens in those instances was, presumably, inadvertent, and it may have also been inadvertent with respect to Hampton-Norfolk.

¹² *Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Bryan and College Station, Texas)*, Report and Order, 3 FCC Rcd 263 (1988), ¶ 2 (emphasis added) (rejecting proposal to hyphenate the proposed Bryan-College Station, Texas allotment market).

a function of the fact that hyphenation of an allotment market serves only the practical purpose of allowing a station to choose which of the hyphenated locales to designate as the station's community of license.¹³ Because localism requires broadcast stations to serve, primarily, *one* community (i.e., the community of license),¹⁴ there is rarely a public interest benefit to permitting a station to choose from among multiple locales.¹⁵ Far from a "compelling" showing in this case, here the Petitioner has made *no* showing to overcome the presumption against hyphenation—instead choosing to ignore the applicable decisions and the governing standard. An analysis of this precedent reveals, unequivocally, that Hampton Roads' proposals must be denied.¹⁶

This high bar could not be more clear. Indeed, when the Commission granted a petition to add additional communities to the hyphenations that already existed in the Hampton Roads geographic region, it observed that

¹³ See *Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations (Hampton-Norfolk-Portsmouth-Newport News, Virginia)*, Report and Order, 53 Rad. Reg. 2d 53, 55 (1983), ¶ 1 ("A hyphenated assignment allows the channel to be used at any of the listed communities.").

¹⁴ See 47 C.F.R. § 73.1120; *Petition for Inquiry into the Need for Adequate Television Service for the State of New Jersey*, Second Report and Order, 59 F.C.C. 2d 1386 (1976), ¶ 15 ("A television station has only one city of license and, therefore, only one primary service obligation.").

¹⁵ Of course, many stations serve, *secondarily*, multiple communities in their service area. And acknowledgement of such service, where desired, can be readily accomplished through a station's "branding" and even on-air station identification. See 47 C.F.R. § 73.1201(b)(2) ("A station may include in its official station identification the name of any additional community or communities, but the community to which the station is licensed must be named first."). Thus, Hampton Roads may already, if it wishes to, add "Elizabeth City" to its on-air station identification and provide programming that addresses issues of interest to that city.

¹⁶ The discussion in this section catalogues virtually all of the Commission's hyphenated allotment and community of license cases. Notably missing is a detailed discussion of the *New Jersey Service* cases from the 1970s. The Commission there rejected hyphenation as a solution to address the service needs of New Jersey. See *Petition for Inquiry into the Need for Adequate Television Service for the State of New Jersey*, Second Report and Order, 59 F.C.C. 2d 1386 (1976), ¶ 16 ("[I]t is our view that a unique hyphenation scheme is not necessary to achieve our New Jersey service goals. . . . Indeed, it would appear that 'hyphenation' of the form advocated by the Coalition and others would create inflexible service obligations and likely could produce an unmanageable and unneeded precedent.").

hyphenation of television markets is an assignment tool used by the Commission in three distinct factual situations. First, a channel is assigned to a hyphenated market where it is best to postpone until the application stage any unresolved or close questions as to which community should use the assignment. *Huntsville-Decatur, Alabama*, 44 RR 2d 457 (1978). Second, hyphenation is proper upon a showing that a station licensed to a small community is likely to fail unless it is able to apply for authority to operate from a larger community. *Nogales-Tucson, Arizona*, 32 FCC 2d 885 (1972). Third, hyphenation is appropriate where it appears that the communities should be treated as one community by reason of their proximity and common social, cultural, trade and economic interests. *Lancaster-Lebanon, Pennsylvania*, 24 RR 1564 (1962).¹⁷

As discussed below, Hampton Roads' proposal does not fit any of the three hyphenation categories recognized by the Commission. And, significantly, the Petition fails to even attempt to argue that it fits any of these circumstances—the Petition offers *no evidence whatsoever* that the circumstances in this case fit any of the three recognized justifications for hyphenating (or, as here, *re-hyphenating*) an allotment market. Moreover, the *Hampton-Norfolk-Portsmouth-*

¹⁷ *Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations (Hampton-Norfolk-Portsmouth-Newport News, Virginia)*, Report and Order, 53 Rad. Reg. 2d 53, 55 (1983), ¶ 8. *Accord Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Bryan and College Station, Texas)*, Notice of Proposed Rule Making, 2 FCC Rcd 3420 (1987), ¶ 2 (stating “Generally the Commission refrains from making hyphenated allotments. In the past, we have done so only where it appeared that the communities should be treated as one due to: (1) common interest and mutual economic, cultural and social interdependence; (2) a showing that neither of the communities could alone support a station; or (3) in order to determine close questions of fact at the hearing stage” and rejecting the petitioner’s argument that proximity of the two communities (4.3 miles) and one community’s “suffering under the economic impact of the rapid decline in oil prices” provided sufficient justification to hyphenate an allotment market of Bryan-College Station, Texas); *Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (New Bedford, Massachusetts-Providence, Rhode Island)*, Notice of Proposed Rule Making, 1986 WL 290816 (1986), *2, ¶ 6 (“As noted in the *Hampton* case, *supra*, hyphenation is an assignment tool used by the Commission in three distinct factual situations. First, a channel is assigned to a hyphenated market where it is best to postpone until the application stage any unresolved or close questions as to which community should receive the assignment. *See: Huntsville-Decatur, Alabama*, 44 R.R.2d 457 (1978). Second, hyphenation is proper upon a showing that a station licensed to a small community is likely to fail unless it is able to apply for authority to operate from a larger community. *See: Nogales-Tucson, Arizona*, 50 F.C.C.2d 939 (1972). Third hyphenation is appropriate where it appears that the communities should be treated as one community by reason of their proximity and common social, cultural, trade, and economic interests. *See: Lebanon and Lancaster, supra*.”).

Newport News, Virginia case is instructive not only for its characterization of Commission hyphenation precedent, but also for its analysis of the very same market that is at issue here. It, and the other hyphenated television allotment cases are discussed immediately below.¹⁸

¹⁸ See also, e.g., *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Odessa, Texas)*, Notice of Proposed Rule Making, 6 FCC Rcd 4756 (1991), ¶ 1 n.1 (“Petitioner requested that the proposed channel be allotted to Odessa or the Odessa-Midland, Texas, radio market. Since petitioner has not provided us with any information to justify the allotment to Odessa-Midland on a hyphenated basis, and because the Commission generally does not make hyphenated allotments, we propose Odessa as the community for the proposed allotment.”); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Austin-Crothersville, Indiana)*, Notice of Proposed Rule Making, 4 FCC Rcd 714 (1989), ¶ 2 (“Hyphenation is an allotment tool which we have used very sparingly. In the past we have done so only where it appeared that the communities should be treated as one due to their nearness and mutual economic, trade, cultural and social interests.”); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Moscow, Ohio; Paris, Wilmore, Morehead, Falmouth, Winchester, Carrollton, Elizabethtown, Dry Ridge, Somerset, and Williamstown, Kentucky)*, Report and Order, 4 FCC Rcd 3441 (1988), ¶ 20 (“WKDJ’s showing is insufficient to justify a hyphenated allotment. The evidence submitted by WKDJ shows that Williamstown and Dry Ridge are separate and distinct communities, with divergent economic, social, and political interests. Moreover, in the absence of a showing that each community could not support a station, we will not make a hyphenated allotment.”); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Chandler, Indiana)*, Notice of Proposed Rule Making, 3 FCC Rcd 3972 (1988), ¶¶ 2, 4 (“Hyphenation is an allotment tool which we have used very sparingly. In the past, we have done so only where it appeared that the communities should be treated as one due to their nearness and mutual economic, trade, cultural and social interests. . . . Since petitioner has not provided us with any information to justify allotting Channel 228A to Chandler-Yankeetown on a hyphenated basis, we have, at this juncture, chosen Chandler as the community for the proposed allotment.”); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Eagle Nest-Angel Fire, New Mexico)*, Report and Order, 3 FCC Rcd 2520 (1988), ¶ 5 (“We also find that petitioner has not provided sufficient evidence that Angel Fire and Eagle Nest should be considered as one community for allotment purposes. Angel Fire and Eagle Nest are located close to each other and each is dependent upon tourism for its economic well-being. However, petitioner provides no information to indicate that the residents of one community are dependent upon the other for economic, trade, cultural or social services, or that the two communities are so closely identified with each other that the allotment cannot sensibly be made to only one community. Indeed, petitioner provided no direct evidence supporting its proposal to hyphenate the two communities. Therefore, we will not allocate Channel 256C2 to Angel Fire-Eagle Nest on a hyphenated basis.”); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Canton, Cartersville, Douglasville, Villa Rica and Newnan, Georgia)*, Report and Order, 3 FCC Rcd 737 (1988), ¶ 24 (“[H]yphenation is an allotment tool which we have used very sparingly. In the past, we have done so only where it appeared that the communities should be as one due to the nearness and mutual economic, cultural and social interdependence. Furthermore, we generally require a showing that none of the communities alone could support a station. While Douglasville and Villa Rica are located close to each other, each is listed as a separate town in the 1980 U.S. Census. Furthermore, we have not been provided with a showing that either community lacks its own services or that the two communities are so intertwined as to have lost their individual characteristics.” (citation omitted)).

(continued ...)

(1) Hampton-Norfolk-Portsmouth-Newport News, Virginia

In the *Hampton-Norfolk-Portsmouth-Newport News, Virginia* case, the Commission agreed with the petitioner there that both Hampton and Newport News should be added by hyphenation to the television allotment market previously known as Norfolk-Portsmouth—to create the allotment market of Hampton-Norfolk-Portsmouth-Newport News, Virginia—because

a showing has been made that Hampton and Newport News are *contiguous and that both are separated from Norfolk and Portsmouth by a narrow body of water easily traversed*. It appears that, except for Norfolk, which is considerably larger, the three other proposed hyphenated cities are similar in population size. It further appears that these four Tidewater jurisdictions *share common cultural, economic and political concerns*. Also, *the Commission has treated all four as a single market for various purposes*, including cable television signal carriage, the prime time access rule, and annual television market financial reports. In light of the preceding, it appears that *these four jurisdictions share a sufficient community of interest to justify consolidation into a single hyphenated television assignment market*.¹⁹

The Commission also went on to reject efforts by other parties to also add Virginia Beach to the multi-hyphenated assignment market, observing:

Virginia Beach is part of the Tidewater [Hampton Roads] area. However, although there is some degree of geographical proximity between Virginia Beach and the other Tidewater [Hampton Roads] cities, and although it is asserted that there is some community of interest amongst them, it does not appear that the requisite

This long line of radio hyphenated allotment cases requiring, at a minimum, a showing of mutual economic, social, and cultural interdependence, is relevant to the analysis in the instant television context. See, e.g., *Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Los Angeles and Norwalk, California)*, Report and Order, 6 FCC Rcd 5317 (1991), ¶ 1 n.2 (rejecting a proposal to hyphenate Norwalk-Downey, California, for television allotment purposes and citing to the seminal *Eagle Nest and Angel Fire, New Mexico* radio hyphenated allotment case and stating: “Commission policy generally disfavors hyphenated allotments, except in circumstances not relevant herein. See, e.g., *Eagle Nest and Angel Fire, New Mexico*, 3 FCC Rcd 2520 (1989).”).

¹⁹ *Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations (Hampton-Norfolk-Portsmouth-Newport News, Virginia)*, Report and Order, 53 Rad. Reg. 2d 53, 55 (1983), ¶ 9 (emphases added).

common social, cultural, trade and economic interests have been evidenced. Although Virginia Beach may be the largest and fastest growing Tidewater [Hampton Roads] city, this would not establish the requisite commonality.²⁰

The Commission need go no further here. The Commission's rejection of Virginia Beach—a fellow “member” of the Hampton Roads region located less than 20 miles from most of the other hyphenated cities—as part of the hyphenation of the Hampton Roads market should end the analysis in the instant case: If Virginia Beach fails to have the requisite common social, cultural, trade and economic interests as Hampton, Norfolk, Newport News, and Portsmouth, Virginia, then certainly Elizabeth City, North Carolina, does not have the requisite degree of interdependence with Norfolk, Virginia, to justify the hyphenation sought by Hampton Roads in the instant proceeding.

None of the relevant facts cited by the Commission to support adding Hampton and Newport News to the hyphenated allotment community are present in the instant case. Norfolk, Virginia, is nearly 45 miles²¹ away from Elizabeth City, North Carolina, is in another state, and shares no local governance, state political leaders, or Congressional members with Elizabeth City. From an economic perspective, while both cities are shipping ports and derive some trade and economic benefits from their respective port activities, they are ports on different bodies of water, on different shipping channels, in different states.²² Elizabeth City is a harbor on the

²⁰ *Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations (Hampton-Norfolk-Portsmouth-Newport News, Virginia)*, Report and Order, 53 Rad. Reg. 2d 53, 56 (1983), ¶ 10.

²¹ A distance of 42.387 miles was calculated using the Commission's online distance calculator at <http://transition.fcc.gov/mb/audio/bickel/distance.html> using coordinates for each city found, respectively, at http://en.wikipedia.org/wiki/Elizabeth_City_NC and http://en.wikipedia.org/wiki/Norfolk_Virginia.

²² See, e.g., *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Eagle Nest-Angel Fire, New Mexico)*, Report and Order, 3 FCC Rcd 2520 (1988), ¶ 5 (“We also find that petitioner has not provided sufficient evidence that Angel Fire and Eagle Nest should be considered as
(continued ...)”)

narrows of the Pasquotank River which feeds the Albemarle Sound—a body of water located entirely within the State of North Carolina. They are patently not separated “by a narrow body of water easily traversed” (as in the *Hampton-Norfolk-Portsmouth-Newport News, Virginia* case)—they are separated instead by multiple counties.

Furthermore, the two locales are divergent culturally and socially—the Hampton Roads geographic region, of which Norfolk is the heart, is a distinctive area where a number of Virginia communities are defined by certain common geographic, cultural and social indicia. Norfolk is, according to the Norfolk Convention and Visitors Bureau, “[c]onsidered the dynamic heart of Virginia’s storied Hampton Roads region.”²³ And, Norfolk’s federally trademarked slogan is “Heart of the Virginia Waterfront.®”²⁴ It is exceedingly difficult to imagine—and, to reiterate, Hampton Roads has neglected to explain—how Norfolk, as the “heart” of both the Hampton Roads geographic region and the Virginia waterfront, could be shown to have economic, social, and cultural interdependence with Elizabeth City, North Carolina, which is “the center of the Elizabeth City Micropolitan Statistical Area,”²⁵ which is separate and apart from the geographic area of Hampton Roads.

one community for allotment purposes. Angel Fire and Eagle Nest are located close to each other and each is dependent upon tourism for its economic well-being. However, petitioner provides no information to indicate that the residents of one community are dependent upon the other for economic, trade, cultural or social services, or that the two communities are so closely identified with each other that the allotment cannot sensibly be made to only one community. Indeed, petitioner provided no direct evidence supporting its proposal to hyphenate the two communities. Therefore, we will not allocate Channel 256C2 to Angel Fire-Eagle Nest on a hyphenated basis.”)

²³ Norfolk: The Heart of the Virginia Waterfront, available at <<http://www.visitnorfolktoday.com/norfolk-va-press/131-norfolk-the-heart-of-the-virginia-waterfront>>.

²⁴ According to Trademarkia.com, this federally registered service mark bears a serial number of 77902575.

²⁵ *NPRM*, ¶ 6. The Elizabeth City Micropolitan Statistical Area consists of the North Carolina Counties of Pasquotank, Perquimans, and Camden. No Virginia counties are part of the Elizabeth City Micropolitan Statistical Area.

In short, the hyphenation sought by Hampton Roads is not borne out by the requisite indicia. (Indeed, Hampton Roads has submitted no evidence whatsoever that the two communities have any interdependent commonalities.) The standard that Hampton Roads must meet here is extremely high: The Commission has stated that “[p]etitioners who seek hyphenated allotments, must make a *very compelling showing*”²⁶ and here, of course, Hampton Roads has, so far, made *no* showing; instead, much of the evidence presented in Hampton Roads’ Petition as to why Elizabeth City qualifies as a “community” for allotment purposes ironically (and unequivocally) demonstrates that Elizabeth City has no indicia of interdependence with Norfolk. That fact should, really, end the matter, and it compels the denial of the Petition.

(2) *Huntsville-Decatur, Alabama*

But even putting aside the obvious and direct applicability of the *Hampton-Norfolk-Portsmouth-Newport News, Virginia* case, none of the precedential hyphenation circumstances are present here (and Hampton Roads has not even attempted to make a showing that they are). The first line of cases—where a channel is assigned to a hyphenated market because it is best to postpone until the application stage any unresolved or close questions as to which community should use the assignment—may be readily dispensed with as inapposite. In *Huntsville-Decatur, Alabama*,²⁷ the Commission was faced with two empty allotments and the issue of which was more likely to be viable, a question that depended, according to interested parties, on which community the allotment would be assigned to. Ultimately, the Commission deferred resolution of that issue by hyphenating the assignment, thereby leaving it to the judgment of the broadcaster to choose which of the two hyphenated cities, as its community of license, was more likely to

²⁶ *Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Bryan and College Station, Texas)*, Report and Order, 3 FCC Rcd 263 (1988), ¶ 2 (emphasis added).

²⁷ 44 Rad. Reg. 2d 457 (1978).

result in a successful broadcasting operation. Those circumstances are simply not present here—WHRO-TV has been successfully operating on its existing channel in its existing hyphenated community for 50 years, there are no empty allotments being considered, and the Commission is not choosing between communities to which to assign empty allotments.

(3) Nogales-Tucson, Arizona

The second line of hyphenated market cases, which involve a showing that neither of the communities at issue could alone support a station, is likewise inapposite and cannot possibly provide the basis for granting Hampton Roads' request. Not only has Hampton Roads made no argument that neither Hampton-Norfolk nor Elizabeth City could alone support a station, it would be impossible and contradictory for Hampton Roads even to attempt to make such a showing. First, WHRO-TV is thriving in its current market and community of license, Hampton-Norfolk.²⁸ Second, the Petition cites the fact that several broadcast stations are already viably operating in Elizabeth City, North Carolina,²⁹ and observes that "Elizabeth City is a major city obviously deserving of a local broadcast station"³⁰—it would be nonsensical for Hampton

²⁸ See, e.g., Inside WHRO: Vision, Mission Values ("We are: . . . A financially capable and sustainable organization delivering an excellent return on the community's investment."), available at <<http://whro.org/home/insidewhro/statement.htm>>; see also Hampton Roads Educational Telecommunications Association, Inc., Annual Report 2010, at 8 (unnumbered) (noting that "our overall financial health remains good, as indicated by the unqualified opinion in our annual audit") (copy attached as Exhibit 2), available at <<http://whro.org/home/documents/WHRO-AnnlRept10.pdf>> ("2010 Annual Report").

²⁹ See Petition, at 4 (observing that Elizabeth City "has a daily newspaper, *The Daily Advance*; and it has two AM broadcast stations and three FM broadcast stations"). For that matter, two FM translator stations (W214BU and W217BQ) and one digital low power television station (W18BB-D) are also licensed to Elizabeth City, North Carolina. A visit to the website of W18BB-D reveals that the facility is used, inter alia, to provide programming intended to serve the needs and interests of residents of Elizabeth City. See <http://www.ecsu.edu/wrvs/aboutw18bbtv.cfm> ("W18BB-TV is dedicated to producing quality programming designed to entertain, educate and inform the communities of Elizabeth City State University and the city of Elizabeth City, North Carolina").

³⁰ Petition, at 3.

Roads to attempt to move WHRO-TV to Elizabeth City if Hampton Roads believed Elizabeth City was incapable of supporting a station. Third, the unique circumstances that were at issue in the *Nogales-Tucson, Arizona* case are simply not implicated here.

In *Nogales-Tucson, Arizona*, the Commission permitted the hyphenated allotment of Tucson-Nogales in light of facts that demonstrated

a severe adverse economic situation. The act of hyphenating Channel 11 between the communities of Tucson and Nogales can only be justified by the need of KZAZ to identify itself (for the purpose of attracting advertising support) with the nationally known market of Tucson. By so doing, KZAZ hopes to survive, and expects to be able to continue television service to its present television audience in and between the communities of Nogales and Tucson. Therefore, in view of the economic realities confronting us and KZAZ, we have decided to redesignate Channel 11, presently assigned to Nogales, as a Tucson-Nogales allocation. This action, on our part, will give petitioner the benefit of applying to have Tucson designated as the city of license for KZAZ.³¹

Hampton Roads' proposal clearly does not come within the ambit of this second category's line of cases. (And, in any event, notwithstanding the Commission's decision in *Nogales-Tucson, Arizona*, the DTV Table of Allotments today does not maintain the hyphenation of Tucson and Nogales.)

(4) *Lebanon-Lancaster, Pennsylvania*

Thus, Hampton Roads is left with only the third line of cases—where common interest and mutual economic, cultural and social interdependence between two locales has been found sufficient to justify hyphenation. But, as discussed above, there is no evidence here of common

³¹ *Amendment of Section 73.606, Table of Assignments, Television Broadcast Stations (Nogales and Tucson, Arizona)*, Report and Order, 23 Rad. Reg. 2d 1665, 1670 (1972) ("*Nogales-Tucson, Arizona*"), ¶ 10.

interest and mutual economic, cultural, and social interdependence between Norfolk, Virginia, and Elizabeth City, North Carolina—all evidence is directly to the contrary.

In addition, the Commission's seminal case in this line of precedent, *Lebanon-Lancaster, Pennsylvania*, is distinguishable on multiple, decisionally significant grounds. In *Lebanon-Lancaster, Pennsylvania*, the Commission ultimately determined that a hyphenated market for allotment purposes was warranted, on the following basis:

With central cities of comparable size, situated in a region which for television allocation purposes has common problems which we have in the past considered together, and located less than 30 miles from each other, Lebanon and Lancaster meet minimal tests for a hyphenated assignment.³²

None of those circumstances is present in the instant case. The population of both cities in Hampton-Norfolk dwarf the population of Elizabeth City, the Commission has not dealt with any common Norfolk/Elizabeth City problems relating to television allocation, and the two cities are nearly 45 miles apart. The cities of Norfolk, Virginia, and Elizabeth City, North Carolina, clearly do not meet the “minimal” test for hyphenation that was met by Lebanon and Lancaster.

Moreover, the Commission's decision in *Lebanon-Lancaster, Pennsylvania* also weighed certain “clear public interest benefits” in the mix:

[W]e have resolved doubt as to the homogeneity of the two communities in favor of hyphenation, because of the clear public interest benefits which are likely to flow from the dual assignment. These benefits stem from the strengthening of the UHF stations in the area upon the successful effectuation of the plan to offer the CBS network programs at a combination rate over three of the four local UHF stations. . . . Since the closer identity of [the petitioner's station] with Lancaster is likely to strengthen UHF in the Lancaster-Harrisburg-York-Lebanon market, a goal of considerable desirability in view of the unstable UHF operation in

³² *Amendment of Section 3.606 Table of Assignments, Television Broadcast Stations (Lebanon and Lancaster, Pa.)*, Report and Order, 24 Rad. Reg. 1564, 1565-66 (1962), ¶ 5 (footnote omitted).